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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 75-448

NOSH CAMAJ,

Petitioner,

-against-

PEOPLE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: FIRST DEPARTMENT

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In the

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NOSH CAMAJ,

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PEOPLE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT STATE OF NEW YORK APPELLATE DIVISION: FIRST DEPARTMENT.

The Petitioner, Nosh Camaj, respectfully prays that a writ of certiorari issue to review the decision of the Appellate Division of the Supreme Court of the State of New York, entered on May 13, 1975.

OPINION BELOW

The Appellate Division of the Supreme Court of the State of New York affirmed on May 13, 1975, the trial court's decision without opinion.

The Court of Appeals of the State of New York refused the petitioner permission to appeal on June 23, 1975.

JURISDICTION

The jurisdiction of this court is provided under Title 28 of the United States Code, Section 1254 (1) which permits for review by the Supreme Court:

> By writ of certiorari upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

QUESTIONS PRESENTED

1. Was the failure of the People to disclose the names of individuals who participated in the viewing of Petitioner in a pre-trial line-up an unconstitutional suppression of evidence mandating a reversal of the trial court's decision?

2. Must the judgment of conviction and sentence be vacated because the Petitioner was deprived of the Constitutional right to a speedy trial?

3. Did the Trial Judge error in not dismissing the indictment at the close of the People's evidence because the testimony of accomplice Johanna Leonardi was insufficient as a matter of law in the absence of corroboration?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The petitioner, Nosh Camaj, was found guilty at a jury trial of the murder of Alfred Stubbla. The verdict was returned after 28 hours of deliberation and the issuance of a "dynamite charge" - Allen v. United States, 164 U.S. 492 (1896) - in the Supreme Court of the State of New York, New York County. Colloquy pp. 2344-2357.

The petitioner was arrested on the morning of March 14, 1972. On June 5, 1972 an indictment was filed by the New York Grand Jury charging the petitioner with the crimes of murder and conspiracy in the first degree, Indictment No. 2900/72. In the same indictment Prela Camaj and Pashko Camaj were indicted

for murder and conspiracy to commit murder. Johanna Leonardi, an alleged co-conspirator, pled guilty to a reduced charge on another indictment before the trial of the petitioner. Subsequently, Miss Leonardi became the State's key witness and played a major role in petitioner's conviction. At trial, Prela and Pashko Camaj were exonerated.

The petitioner has never previously been convicted. Mr. Camaj fled to America from Albania where he served his country honorably on the battlefield fighting the encroaching forces of Communism.

Trial commenced on March 25, 1974 - two years after indictment - before Hon. Peter McQuillan. Johanna Leonardi testified that she worked as an agent for the petitioner in an elaborate murder scheme to avenge

the death of Mr. Camaj's brother. She told of a promise by the petitioner to pay her $5,000 if she would date Mr. Scubbla and entice him to a secluded spot where petitioner could attack him.

At trial testimony demonstrated that:

(a) Miss Leonardi loved the petitioner who had broke off with her, Leonardi p. 1936.

(b) A medical expert testified that Miss Leonardi's confession that she had taken marijuana, valium and alcohol on the night of the murder produced a confused state in her mind, Hyland p. 1575.

(c) Although Miss Leonardi vehemently denied any bargains with the prosecution for leniency, District Attorney recieved a gift in the amount of $20.00 from Miss Leonardi, Colloquy, p. 2189.

During the course of the trial, the State introduced Patrick Cooney, a witness to the murder. At the time, the petitioner did not know that Mr. Cooney was one of two individuals who had failed to identify him as the murderer in a pre-trial line-up which occurred immediately after the event. The State had failed to disclose this detail. T.J. Dunn, the other witness, unable to make a positive identification. vanished during the two year lapse from indictment to trial.

This case was affirmed without opinion by the Appellate Division of the Supreme Court of New York on May 13, 1975. The Court of Appeals refused permission to appeal on June 23, 1975.

REASONS FOR GRANTING THE WRIT

POINT I

FAILURE OF THE PEOPLE TO DISCLOSE THE NAMES OF THE INDIVIDUALS WHO PARTICIPATED IN THE VIEWING OF THE PETITIONER IN A PRE-TRIAL LINE-UP CONSTITUTED AN UNCONSTITUTIONAL SUPPRESSION OF EVIDENCE.

In Brady v. Maryland, 373 U.S. 83 (1963) the Supreme Court acknowledged that a defendant's facilities for gathering evidence are greatly disproportionate to those of the government. Since 1963, the Court reshaped the guidelines of "Brady Material" in the three prong test promulgated in Moore v. Illinois, 408 U.S. 786 (1972).

The Moore Court announced that the important factors are:

"(a) Suppression by the prosecution after a request by the defense;

(b) The evidence's favorable character for the defense;

(c) The materiality of the evidence."

Moore v. Illinois, 408 U.S. 786 at 794.

The petitioner believes that the inferior courts have grossly miscontrued the Moore Court's delineation of "materiality".

Any argument that favorable evidence was not withheld from the petitioner is clearly fallacious. The prosecution did not disclose the identities of two witnesses of the murder who, at a pre-trial line-up in which petitioner was displayed, failed to identify him as the murderer. At the line-up the Petitioner was represented by Mr. Barse who at the time was counsel for Prela and Pashko Camaj. Before trial

commenced, the petitioner retained Mr. Boxer. Mr. Barse remained as counsel for Prela and Pashko Camaj. Although original counsel for the petitioner was present at the line-up, counsel was unable to see the two individuals-Patrick Cooney and T.J. Dunn.

> THE COURT: You were present, Mr. Barse?
>
> MR. BARSE: Yes, I was present, but was not permitted to view the two witnesses.
>
> Sentence, Colloquy p. 13

Thus, when Mr. Cooney was called as a witness for the prosecution, counsel for the defense did not know that he was a witness at the line-up.

The fact that the Petitioner did not know that Mr. Cooney could not identify him in the line-up stripped him of valuable cross-examination at the trial.

It is axiomatic that testimony by an eye-witness of a crime which demonstrates that the accused was not present is favorable. At trial, Mr Cooney testified that he witnessed the murder.

> MR. COONEY: ". . . I looked up and there were five people on the road and one man was shooting another man. . .".
>
> Cooney p. 1026

Although at the time of the trial, more than two years after the event, Mr. Cooney's memory was inaccurate, he had a vivid re-collection of the events at the time of the murder.

MR. COONEY: "I remember the clothing at the time, but I can't remember right now. I think I mentioned about the clothing at the time, two years ago, to the police officer or somebody."

Cooney p. 1028

Thus Mr. Cooney's testimony at the trial demonstrates that he:

(a) saw the murder

(b) had a vivid recollection at the time of the event.

The fact that the petitioner was displayed to Mr. Cooney, an eyewitness to the murder, and was not identified is tantamount to Mr. Cooney's proclamation that the petitioner was not the murderer.

The final requisite of the "Brady-Moore" test is that the degree of favorableness be material to the defendant's

innocence. In Moore the Court determined that the prosecution's suppression of favorable material, in light of the bulk of evidence, would not have influenced the jury's determination of guilt. The Moore Court's determination of materiality was essentially an ad hoc one. As a result, inferior courts have vascillated dramatically in their determination of materiality. In the case at bar, the courts below did not find that the suppression of the names of the witnesses at the line-up, in light of the jury's 28 hour deliberation and the Court's issuance of a "dynamite charge", was material to the petitioner's guilt. The evidence demonstrates the opposite.

First, the sole witness against the

petitioner was his ex-lover Miss Leonardi. Her testimony was of a woman scorned.

MR. BOXER: You wanted to marry him (Nosh Camaj) pretty much; is that correct?

LEONARDI: I loved him, I did, yes.

Leonardi p. 1397

In addition, she confessed being "high" on a combination of marijuana, valium and alcohol on the night of the murder.

MR. BARSE: You stated on direct examination you had some pills that night; is that correct?

LEONARDI: Yes.

MR. BARSE: What kind of pills did you have?

LEONARDI: Valium.

. . .

MR. BARSE: You said you took another kind of pill, didn't you?

LEONARDI: I took a diet pill earlier.

MR. BARSE: It's an upper, isn't it?

LEONARDI: I guess you would call it that.

MR. BARSE: You also had a joint, didn't you?

LEONARDI: Yes.

. . .

MR. BARSE: Then you had a couple of drinks after that, didn't you?

LEONARDI: Yes.

MR. BARSE: How many drinks did you have?

LEONARDI: Three.

Leonardi pp. 1435-37

The two year delay between indictment and trial was the result of the prosecution attempt and success to have Miss Leonardi turn People's

witness. Her testimony was influenced by charges of welfare fraud which faced her.

> MR. BOXER: Subsequently after you had talked to Mr. Toolan [Assistant District Attorney] that day and again you talked to the grand jury, I believe it was some time early in May of 1972, you were sentenced in Bronx, Part 6 on the welfare fraud, isn't that correct?
>
> LEONARDI: Yes
>
> MR. BOXER: And you received a sentence, ma'am of time served, isn't that correct?
>
> LEONARDI: Time served after I did the time for the case.
>
> Leonardi p. 1358

At the end of the trial the jury illustrated that they did not accept Miss Leonardi's entire story and exonerated Prela and Pashko Camaj. Their 28 hour deliberation and the Court's

issuance of a "dynamite charge" demonstrates that the jury's decision was a tenuous one, and was a compromise verdict. The information withheld by the prosecution would have had a powerful and substantial effect on the jury's decision; it was material to the petitioner's conviction.

After the trial, the prosecution openly confessed that the suppression of Mr. Cooney's and Mr. Dunn's identities as witnesses at the pre-trial line-up was deliberate.

> THE COURT: Mr. Toolan, at -- before the Trial, or during the trial, did you disclose to the defense the names of the witnesses who viewed Nosh Camaj in the line-up and who failed to identify Nosh Camaj?
>
> MR. TOLAN: No, I did not, Your Honor.
>
> THE COURT: Who were the witnesses who viewed Nosh Camaj in the line-up

and who failed to identify Nosh Camaj?

MR. TOLAN: The witness, Cooney, who testified in this case and witness T.J. Dunn. And T.J, Dunn personally did not testify in this case.

THE COURT: Was the name "T.J. Dunn" disclosed to the defense before or during trial?

MR. TOLAN: No, Your Honor, it was not.

Sentence, Colloquy p.9

The acts of suppresssion by the prosecution were intentionally designed to prejudice the petitioner of a fair determination of guilt or innocence by the jury. This action should not be sanctioned. A criminal trial is not a parlor game or a sports contest in which the prosecution is to outwit and entrap the accused.

In light of the suppression of the exculpatory evidence and of the tenuous decision reached by the jury, the petitioner prays for relief. The actions of the prosecution in the instant case flew in the face of the guidelines set out in Brady and Moore, and violates the basic guarantees of due process firmly implanted in the Constitution.

POINT II

WAS PETITIONER'S FAILURE TO FORESEE IMMINENT PREJUDICE AT MOTION TO DISMISS INDICTMENT FOR LACK OF SPEEDY TRIAL CONSTITUTE A WAIVER OF THAT CONSTITUTIONAL RIGHT IN LIGHT OF PROSECUTION'S DELIBERATE DELAYS TO OBTAIN A TACTICAL ADVANTAGE.

The right to a speedy trial is inextricably imbedded in decisional and constitutional law. The Sixth Amendment of the Constitution guarantees the accused this right. In Klopfer v. North Carolina, 386 U.S. 213 (1967) the Court established that the right to a speedy trial is "fundamental" and is imposed by the Due Process Clause of the Fourteenth Amendment on the States. The criteria by which the speedy trial right is judged was set out in Barker v. Wingo, 407 U.S. 514 (1972). No

per se rule was constructed. Instead, the Court noted that four factors must be balanced when making the determination:

> "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant", See Barker v. Wingo, supra. at 529.

In the case at bar, the petitioner was arrested March 14, 1972. United States v. Marion, 404 U.S. 307 (1971) held that the Sixth Amendment Right does not attach until either a formal indictment or information or else the actual restraints imposed by arrest and holdings to answer a criminal charge. Trial commenced on March 5, 1974 - a lapse of two years. Barker noted that the length of delay does not per se

constitute a violation of speedy trial, but acts as a triggering mechanism for further examination.

The petitioner vigorously protested the successive delays by the prosecution. In December of 1973 a motion was brought by the defense for dismissal of the indictment on the grounds that the petitioner was denied his right to speedy trial. This motion was renewed as a pre-trial motion on January 7th, 1974.

The reason for delay was not based on good cause. The prosecution sought numerous delays for the purpose of disposing of the Johanna Leonardi case. Adjournments were granted on July 19, 1972, August 9, 1972, August 25, 1972, March 5, 1973, April 11, 1973, May 9, 1973, June 18, 1973, September 12, 1973,

and October 4, 1973. These delays were unreasonable in light of Barker:

> "A deliberate attempt to delay in order to hamper the defense should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nonetheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant". See Barker v. Wingo, Supra, at 531.

The Court has consistently held that it is improper for the prosecution intentionally to delay "to gain some tactical advantage over [defendants] or to harass them." United States v. Marion, 404 U.S. 307, 325 (1971). See also Pollard v. United States, 352 U.S. 354, 361 (1957). Clearly the prosecution's

intentional delays to gain the tactical advantage of Miss Leonardi's testimony were improper.

Finally, the petitioner suffered substantial prejudice from the delay. Generally, prejudice encompasses pre-trial incarceration, unnecessary anxiety and, most importantly, impairment to the defense of the accused. In the instant case, the testimony of one T.J. Dunn, a witness to the murder who failed at a pre-trial line-up to identify the petitioner, was unavailable. Mr. Dunn had mysteriously vanished in the two year lapse between arrest and trial.

Thus, the petitioner suffered a two-fold impairment:

the prosecution gained a key witness, and the petitioner lost an exculpatory witness.

On January 7, 1974 the petitioner made a pre-trial motion to dismiss the indictment against him for lack of speedy trial. In denying petitioner's motion on February 13, 1974, Mr. Justice Sandifer made the following finding:

> "Also pursuant to CPL §210. 45(1), defendants fail to set forth or substantiate by sworn facts the basis of this motion. Counsel fails to show prejudice of any kind to these defendants in his papers and merely makes a conclusory statement that the right to a speedy trial has been violated.

In Barker the Court went to great lengths

to illustrate that "speedy trial" is a constitutional right that cannot be waived:

> "In excepting the right to speedy trial from the rule of waiver to other fundamental rights, courts that have applied the demand-waiver rule have relied on the assumption that delay usually works for the benefit of the accused and on the absence of any readily ascertainable time in the criminal process for a defendant to be given the choice of exercising or waiving his right. But it is not necessarily true that delay benefits the defendant". Barker v. Wingo, 407 U.S. 514, 525 (1972).

It is the amorphous quality of the right that makes it impossible to pinpoint a precise time in the criminal process when the right must be asserted. In the same vein, the defendant must not

be forced to assume the role of an augur or soothsayer and foresee future impairment to his defense which will result from the delay. To place this burden of "futurity" on the accused would be tantamount to labeling "speedy trial" a spurious right.

It is essential to note that petitioner's lack of knowledge of Mr. Dunn's testimony was not accidental. The identification of Mr. Dunn as a witness to the pre-trial line-up was suppressed by the prosecution. Sentence minutes, Colloquy p. 9
The impairment of petitioner's defense was the result of the two year delay and suppresssion of the witness who could no longer be located.

Thus, the petitioner prays for "speedy trial" relief not because the trial court failed to satisfy a trial timetable, but because a precious constitutional right was breached, and as a result, the petitioner suffered a grave injustice.

In sum, the petitioner's defense was greatly impaired by the two year lapse. In addition, petitioner's inability to foresee this impairment is tainted by prosecutorial misconduct. The petitioner respectfully requests the Court to intervene to correct this constitutional violation in the trial of the most serious crime of all - the high crime of murder.

POINT III

THE TRIAL JUDGE ERRED IN NOT DISMISSING THE INDICTMENT AT THE CLOSE OF THE PEOPLE'S EVIDENCE BECAUSE THE TESTIMONY OF ACCOMPLICE JOHANNA LEONARDI WAS INSUFFICIENT AS A MATTER OF LAW IN THE ABSENCE OF CORROBORATION.

In the State of New York, the law regarding the sufficiency of the testimony of an accomplice is set out in CPL Section 60.22 Subdivision (1):

> "A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence to connect the defendant with the commission of the offense".

The "accomplice rule" is intended

to preclude a conviction based soley upon the testimony of accomplices, who frequently purchase immunity from the prosecution by offering to testify and who frequently are disreputable and criminal characters. People v. Kress, 284 N.Y. 452, (1940). The degree of corroboration required is that the evidence must tend to connect the defedant with the commission of the crime. The corroborative evidence "must be evidence from an independent source of some material fact tending to show not only that the crime has been committed, but that the defendant was implicated in its commission". People v. Nitzberg, 287 N.Y. 183, 192 (1941).

In the case at bar the People failed

to demonstrate that the Petitioner was implicated in the crime outside of Miss Leonardi's testimony. The People make several fallacious allusions to "corroborative" evidence: a telephone call to Leonardi's apartment following the murder; Leonardi's note to the illiterate Prela Camaj; the telephone company's record of the call from his house to the prison where Stubbla's wife was jailed; his statements to Carchinetta that he wanted his brother's murderer to be taken care of; and his absence from his home the night of the murder.

Every example cited is void of implication. For example, the fact that the petitioner wanted his brother's

murderer to be "taken care of" does not prove:

(a) Petitioner wanted the task accomplished in an illegal manner.

(b) The crime had been committed.

(c) That Petitioner was involved in the crime.

In the same vein, Petitioner's exculpatory statements in which he denied knowing Leonardi or Stubbla were grossly misconstrued by the People. The Petitioner, an Albanian, has a substantial problem with the English language. At the time of the questioning, the Petitioner was scared and without counsel; he did not fully comprehend the questions.

In sum, the intricacy and complexity of our legal principals have often posed

arduous tasks for juries. In the present case, the jury failed to correctly determine that the evidence presented by the People did not implicate the Petitioner in the crime. The Petitioner should not be penalized for their error. The testimony of Miss Leonardi was the sole culpatory evidence presented at the trial. When one considers the motives of Miss Leonardi, a distraught woman rejected by the Petitioner, her passions are of no surprise. This is not a murder case at all, but a monumental and shameful example that hell hath no fury like a woman scorned.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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ORDER OF AFFIRMANCE OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 13, 1975.

Present--Hon. Arthur Markewich, Justice Presiding
Theodore R. Kupferman
Francis T. Murphy, Jr.
Vincent A. Lupiano
George Tilzer, Justices.

The People of the State of New York,

Respondent,

-against-

Nosh Camaj,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the

judgment of the Supreme Court, New York County (McQuillan, J.), rendered on June 7, 1974, convicting him of the crime of murder, and said appeal having been argued by Mr. Samuel Boxer of counsel for the appellant, and by Mr. Gerald M. Labush of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

/s/ Hyman W. Gamso

Clerk.

Counsel for appellant is referred to § 606.5(2), Rules of the Appellate Division, First Department.

CERTIFICATE DENYING LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. SOL WACHTLER,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK

against

NOSH CAMAJ

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of

Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
June 24, 1975

/s/ Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, New York, dated June 7, 1974; affirmed by Appellate Division, First Department, May 13, 1975.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Nosh Camaj seeks a writ of certiorari to review an order of the New York State Appellate Division, First Department, entered May 13, 1975. *People* v. *Camaj*, —— A.D.2d —— (1st Dept. 1975). The order of the Appellate Division unanimously affirmed, without opinion, Camaj's conviction in the Supreme Court of New York County of MURDER (N.Y. Penal Law §125.25). Following his conviction, Camaj was sentenced, on June 7, 1974, to a term of imprisonment of 15 years to life.

On June 23, 1975, the New York State Court of Appeals issued a certificate denying Camaj permission to appeal.

Introduction

For several months, Nosh Camaj plotted to kill Alfred Stubbla. Camaj's motive was revenge. He blamed Stubbla for the murder of his brother, Stephen. On March 14, 1972, Stubbla was lured to a Manhattan restaurant by Camaj's girl friend, Johanna Leonardi. When Stubbla left the restaurant, Camaj, along with his brother and cousin, was waiting. Camaj ran behind Stubbla, pointed a gun at the back of his head, and shot him three times.

Two passers-by, Patrick Cooney and T. J. Dunne, saw the shooting and notified two policemen. The police caught Leonardi and Camaj's two relatives as they were attempting to flee in a taxicab. Camaj escaped on foot, but he was arrested at his home later that day.

In an indictment filed by the New York County Grand Jury on June 5, 1972, Camaj was charged with the crimes of murder and conspiracy in the first degree. Indictment No. 2900/72.

At the trial Johanna Leonardi testified for the People. Largely based on her testimony, the jury convicted Camaj of murder.* He was sentenced on June 7, 1974, to a term of imprisonment of from fifteen years to life. He is presently serving that sentence.

Camaj appealed unsuccessfully to the Appellate Division. Subsequently, he was denied permission to appeal to the Court of appeals.

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* The conspiracy count was not submitted to the jury.

Camaj asks this Court to grant a writ of certiorari to review the decision of the Appellate Division.

He argues that the prosecutor suppressed exculpatory evidence and that he was denied his Sixth Amendment right to a speedy trial. In addition, he contends that the prosecutor failed to meet the requirements of New York's corroboration requirement.

The Appellate Division, in sustaining Camaj's conviction, rejected these claims without comment.

POINT I

Camaj contends that the prosecutor failed to disclose exculpatory evidence. He has failed to demonstrate this contention.

In the instant petition Camaj renews his contention, rejected without comment by the Appellate Division, that the prosecutor withheld the identity of a witness to the murder. This witness, T. J. Dunne, was unable to identify Camaj (or anyone else) in a lineup held some days after the defendant's arrest. Camaj speculates that the "withheld" identity of Dunne woud have provided him with exculpatory evidence. Petition at 11.

In the first place, no evidence was suppressed. Camaj was represented by counsel, Lawrence Barse, at the lineup. Mr. Barse knew that two witnesses viewed the lineup and were unable to identify anyone, including Camaj (Barse:

1603, 1607).* No defense counsel ever asked for the names of these witnesses, but nonetheless it was obvious to all who they were. At the trial, one of the two, Patrick Cooney, testified for the People. On his direct examination he said that he was with Dunne when they heard shots (late at night), saw people running away, and called the police who then caught several of Camaj's companions, but not Camaj (Cooney: 1026-7). Cooney was not asked to, and did not, identify Camaj at the trial.

In the second place, Dunne had no exculpatory evidence to give. Late at night he heard shots and saw people running up the street. It is neither surprising, nor exculpatory, nor even probative, that Dunne could not identify those people and was unable to identify anyone in the lineup. To whatever extent it is even arguable that Dunne's inability to identify Camaj might have helped Camaj, that purpose was served by the testimony of Dunne's companion, Cooney, who testified to precisely the same effect as Dunne would have—that is, that he saw the shooting but could not identify Camaj.

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* Numerical references are to the typewritten transcript of the trial filed by the petitioner with the Appellate Division.

POINT II

Camaj contends that the trial court erroneously denied his motion to dismiss the indictment for lack of a speedy trial. However, he does not demonstrate that the decision below, with respect to this contention, rested upon federal grounds. He has thus failed to show that this Court has jurisdiction to review the state court's decision, and his petition should be denied. In any event, Camaj's contention under federal law does not warrant review by this Court.

A. Camaj has failed to establish this Court's jurisdiction.

One who petitions this Court to review the judgment of a state court must establish that the Court has jurisdiction to do so. *Durley* v. *Mayo*, 351 U.S. 277, 281-82 (1956); *Stembridge* v. *Georgia*, 343 U.S. 541, 547 (1952); *Memphis Natural Gas* v. *Beeler*, 315 U.S. 649, 651 (1942); *Klinger* v. *Missouri*, 13 Wall. 257, 263 (1871).

Camaj seeks to invoke the jurisdiction vested in this Court by 28 U.S.C. §1257(3). Petition at 3.*

Camaj must demonstrate that the state court judgment which he asks this Court to review rested upon federal

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* §1275(3) provides in revelant part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, * * * where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States

Petitioner's reference to 28 U.S.C. §1254(1) clearly should have been to §1257(3).

grounds. *See e.g. Durley* v. *Mayo, supra.* To give effect to this requirement, the rules of this Court provide that one who petitions the Court for certiorari must state "the way in which [the federal questions] were passed upon by the [state] court * * *." Supreme Court Rules, Rule 23(1)(c), 398 U.S. 1035.

Camaj has not, and cannot, satisfy this requirement because there is no indication that the state appellate court, in fact, dealt with Camaj's federal claim.

Camaj was indicted on June 5, 1972. On January 7, 1974, 18 months after the indictment, Camaj moved to dismiss the indictment for "lack of a speedy trial." In support of his motion, he cited only the lapse of time since his indictment. He did not allege prejudice; he did not allege that the People or the courts were responsible for the delay; he did not allege that he had demanded a speedy trial.

His motion was denied on February 13, 1974, and his trial commenced six weeks later.

On appeal to the Appellate Division, Camaj argued, as he does to this Court, that the trial court improperly denied his motion to dismiss the indictment. He contended that the delay in this case violated the standards set forth by this Court in *Barker* v. *Wingo,* 407 U.S. 514 (1972). Appellate Division Brief at 7-11. Petition at 22-30.

The People, however, urged that this argument be ignored because Camaj had not properly preserved it for appellate review in accord with applicable state law. 22 New York Codes, Rules and Regulations §§600.10 (b)(1)

(iii) and 600.10(d)(2)(iii). Under state law, it is appellant's responsibility to supply the appellate court with a record adequate to determine the issues raised by him. Camaj did not do so. For example, Camaj failed even to supply the Appellate Division with the minutes of those dates on which his case was adjourned. See Respondent's Brief in the Appellate Division, at 13.

The Appellate Division affirmed Camaj's conviction without opinion. The remittitur of the Appellate Division is silent with respect to the grounds upon which its decision rested. Appendix A to the Petition. And Camaj, represented by able counsel, did not request the Appellate Division to amend its remittitur so as to indicate the basis of the court's decision, a common practice in New York. New York Civil Practice Laws and Rules, Rule 5524. *See, e.g. People* v. *Schwartzman,* 24 N.Y.2d 241, 299 N.Y.S. 2d 817, remittitur amended 24 N.Y.2d 914, 301 N.Y.S. 2d 644, *cert. denied,* 396 U.S. 846 (1969). In such circumstances this Court has held that it has no jurisdiction if "it appears that the judgment [of the state court] might have rested upon a non-federal ground * * *." *Stembridge* v. *Georgia,* 343 U.S. 541, 547 (1952).

Thus, the Appellate Division may not have reached the merits of Camaj's claim, but, rather, rejected it on the basis of the independent and adequate state ground urged by the People.

Certainly a state court's insistence upon the enforcement of a procedural rule requiring the appellant to file an adequate record upon which to decide his appeal serves legitimate state interests. *Henry* v. *Mississippi,* 379 U.S. 443, 446-7 (1965).

B. Camaj's contention does not warrant review by this Court.

In *Barker* v. *Wingo*, 407 U.S. 514 (1972), this Court held that a delay more than twice the length of delay in this case was justified and that the petitioner had not been deprived of his right to a speedy trial. No *per se* rule exists. The length of the delay is only one factor to be considered by a court in ruling on a speedy trial claim. The others are: "the reason the government assigns to justify the delay," "the degree of the defendant's assertion of his right," and the "prejudice to the defendant" caused by the delay. *Barker* v. *Wingo, supra,* at 531-2. Of course, to the extent that the delay is attributable to the defense, and not to the prosecution or the courts, these factors need not even be considered, for such conduct on the part of the defendant constitutes a waiver of his Sixth Amendment right to a speedy trial. *Barker* v. *Wingo, supra,* at 529.

Here, 18 months after his indictment, Camaj moved to dismiss the indictment for lack of a speedy trial. In support of his motion, he cited only the lapse of time since his indictment. He did not allege prejudice he did not allege that the People or the Courts were responsible for the delay; he did not allege that he had demanded a speedy trial. Camaj's claim that he objected to the nine adjournments prior to his motion (Petition at 24), is not supported by the record. Indeed, for all that can be determined from the record that he presented to the Appellate Division, Camaj may have requested each delay.

Camaj's conclusory motion, citing only a less than two-year delay, fails to raise a substantial federal question.

POINT III

Camaj's claim that the trial court erroneously failed to dismiss the indictment because of the absence of evidence corroborating the "accomplice" testimony does not involve a federal question.

Camaj argues that the People failed to corroborate the testimony of Camaj's accomplice, Johanna Leonardi. Camaj's argument is based exclusively on New York's requirement that "a defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence to connect the defendant with the commission of the offenses." New York Criminal Procedure Law (McKinney's) §60.22(1). He does not claim that the People's failure to corroborate Leonardi's testimony violates any right, title, or immunity under the federal constitution.

He thus raises no federal issue, and there is no question for this Court to consider.

Conclusion

The petition should be denied.

Respectfully submitted,

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